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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

GRACIELA E. ORTIZ,

Plaintiff and Appellant,

v.

AMERICAN COMPANION AND
CAREGIVERS,

Defendant and Respondent.

B284730

(Los Angeles County
Super. Ct. No. BC646004)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michelle Williams, Judge. Affirmed.

Graciela E. Ortiz, in pro. per., for Plaintiff and Appellant.

Kring & Chung, Kyle D. Kring, Morgan E. Podruski and Allyson K. Thompson for Defendant and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

On January 6, 2017, appellant Graciela E. Ortiz filed her complaint in propria persona, alleging a single cause of action for discrimination under the Fair Employment and Housing Act, Government Code section 12900 et. seq. (FEHA) against respondent American Companion and Caregivers (ACC).¹ The complaint stated that appellant is “a female of Latino descent who was 55 at the time of the employment practices complained of.” It alleged that “Defendants” (collectively, respondent ACC and two other entities who are not parties to this appeal) wrongfully terminated her employment, illegally searched her property, wrongfully evicted her, took her personal belongings, and unlawfully discriminated against her. Appellant attached as exhibits a 1099 form showing earnings from respondent in 2015, and a medical form identifying herself as a “[r]etired [e]mployee” as of June 2015.

On July 14, 2017, respondent demurred to the complaint on the grounds that: (1) appellant failed to allege that she had exhausted her administrative remedies; (2) appellant failed to allege facts sufficient to state a cause of action against ACC, because she did not establish she was an employee of ACC or state what discriminatory conduct she suffered; and (3) the complaint was uncertain as to the identity of the defendants and the specific allegations against respondent. Appellant opposed the demurrer, arguing that she had exhausted her administrative remedies by sending a grievance complaint to respondent in January 2016, which she attached as an exhibit. The handwritten grievance complaint detailed the alleged unlawful

¹ All further statutory references are to the Government Code.

conduct prompted by her “ra[c]e” and “anti-Hispanic . . . sentiment.”²

The trial court sustained the demurrer without leave to amend. It ruled that appellant had failed to demonstrate that she had exhausted her administrative remedies, and had also failed to allege facts sufficient to state a cause of action for discrimination: “Although [appellant’s] allegations may be sufficient to establish that [she] is a member of a protected class and that she suffered an adverse employment action, these allegations are insufficient to demonstrate that [appellant] was wrongfully terminated because of her sex, age or race.” It denied leave to amend because it was “unlikely [appellant] can successfully amend to overcome her failure to exhaust administrative remedies.”³ Appellant timely appealed from the order sustaining the demurrer without leave to amend, and dismissing ACC from the action.⁴

² In its reply, respondent argued that appellant had failed to properly request judicial notice of the exhibits. Although respondent also referenced a W9 form and an independent contractor application and independent contractor agreement which appellant supposedly attached as exhibits to the complaint, these documents are not part of the record on appeal.

³ The court overruled the demurrer on grounds of uncertainty, noting that “it [was] clear” appellant was asserting a FEHA discrimination claim against respondent. The court also noted that although appellant “[had] not alleged that she was employed by [respondent],” the employment relationship could be inferred from the allegation that respondent had wrongfully terminated her and from the exhibits attached to the complaint.

⁴ Although an order sustaining a demurrer is usually not an appealable final judgment, “an order of dismissal is to be treated

DISCUSSION

A. *Standard of Review*

Because a demurrer tests the legal sufficiency of the complaint, and the granting of leave to amend involves the trial court's discretion, we employ two separate standards of review on appeal. First, we review the complaint de novo to determine whether it contains sufficient facts to state a cause of action. "Reversible error exists if facts were alleged showing entitlement to relief under any possible legal theory." (*Lee v. Los Angeles County Metropolitan Transportation Authority* (2003) 107 Cal.App.4th 848, 853, italics omitted (*Lee*)). Second, where the demurrer is sustained without leave to amend, we must determine whether the trial court abused its discretion in doing so. "It is an abuse of discretion to deny leave to amend if there is a reasonable possibility that the pleading can be cured by amendment." (*Id.* at p. 854.)

B. *Failure to Exhaust Administrative Remedies*

Before bringing a FEHA action, a plaintiff must exhaust administrative remedies by filing a complaint with the Department of Fair Employment and Housing (DFEH). (*Medix Ambulance Service, Inc. v. Superior Court* (2002) 97 Cal.App.4th 109, 116; *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724.) The exhaustion rule is jurisdictional. (*Martin, supra*, at p. 1724.) Thus, before appellant was legally

as a judgment for the purposes of taking an appeal when it finally disposes of the particular action and prevents further proceedings as effectually as would any formal judgment." (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699; see also *Hudis v. Crawford* (2005) 125 Cal.App.4th 1586, 1590, fn. 4 [order sustaining demurrer without leave to amend and dismissing case as to defendant deemed appealable].)

entitled to bring her action against ACC, she was required to file a “verified complaint” in writing and obtain a DFEH right-to-sue letter. (*Ibid*; § 12960, subd. (d).) The administrative proceeding must be commenced within one year of the last unlawful conduct. (§ 12960, subd. (d).)

Appellant’s failure to exhaust administrative remedies is fatal to her FEHA discrimination claim. Appellant did not allege that she filed a complaint with the DFEH or that she obtained a right-to-sue letter, as jurisdictionally required. Although the exact dates of her alleged grievances are not specified in the complaint, assuming the last unlawful act occurred in January 2016 (when she allegedly sent the grievance complaint to ACC), she failed to file an administrative complaint with the DFEH by January 2017. Notifying respondent of her grievances does not satisfy the administrative exhaustion requirement. (See *Cole v. Antelope Valley Union High School Dist.* (1996) 47 Cal.App.4th 1505, 1515 “[FEHA] does not authorize any alternative to the requirement of the filing of a ‘verified complaint in writing’ with DFEH; ‘it would not be practical to allow an employee to substitute unverified information . . . for a formal administrative charge’].) As such, appellant is statutorily time-barred from asserting her FEHA action.

C. *Failure to Plead Facts Sufficient to State a Cause of Action*

The FEHA prohibits an employer from discriminating against any employee based on race, age, sex or other protected characteristics. (§ 12940, subd. (a).) To withstand demurrer, appellant must sufficiently plead all elements of a discrimination cause of action, viz., (1) that she was a member of a protected class; (2) that she was adequately performing the essential

functions of her position; (3) that she suffered an adverse employment action; and (4) that the circumstances suggest a discriminatory motive. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355; see also *De Jung v. Superior Court* (2008) 169 Cal.App.4th 533, 551 [requiring causal relationship between discriminatory animus and adverse employment action].)

Appellant has failed to allege facts demonstrating a discriminatory motive. As the trial court found, at most she has alleged that she was a member of a protected class and that she suffered an adverse employment action. We find no circumstances suggesting that the adverse employment action was motivated by discrimination based on her protected status. Therefore, the demurrer was properly sustained because appellant failed to plead sufficient facts to state a cause of action for discrimination.

D. *Denial of Leave to Amend*

Additionally, appellant argues that the trial court abused its discretion when it refused to grant her leave to amend. “[U]nless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion. [Citation.] The burden is on the plaintiff to demonstrate how he or she can amend the complaint.” (*Lee, supra*, 107 Cal.App.4th at p. 854.) Although the likelihood of a viable amendment turns on a case-by-case basis, denying leave to amend may be particularly appropriate when the facts disclose that the claim is barred by the statute of limitations. (See *Derosé v. Carswell* (1987) 196 Cal.App.3d 1011, 1030, superseded by statute on other grounds.)

Appellant cannot establish that an amendment would cure the fundamental defect presented by the expired statute of

limitations. Neither below nor on appeal did appellant allege – or suggest she could allege – that she had filed a complaint with DFEH within one year of the alleged discriminatory action. Her failure to do so bars her from asserting her civil claim. Accordingly, the trial court did not abuse its discretion in sustaining the demurrer without leave to amend.

DISPOSITION

The judgment of the trial court is affirmed. The parties shall bear their respective costs on appeal.

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MANELLA, P. J.

We concur:

WILLHITE, J.

DUNNING, J.*

*Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.